76-1634

SUPREME COURT OF THE UNITED STATES

In the Matter of the Estate of
JOSEPH R. BAER, Deceased

MARCELL BAER and WESLEY A. BAER,
Executors of the Estate,

Appellants

vs.

JENNIE BAER,

Appellee

JURISDICTIONAL STATEMENT

Appeal from the Supreme Court of Utah
Case No. 14676

Theodore S. Perry
444 North Main St.
Logan, Utah
Attorney for Appellants

Lyle Hillyard
175 East First North
Logan, Utah
Attorney for Appellee

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In the Matter of the Estate of
JOSEPH R. BAER, Deceased

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vs.

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Appellee

APPEAL FROM THE SUPREME COURT OF UTAH

JURISDICTIONAL STATEMENT

Appellants submit herewith their jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

In the Matter of the Estate of Joseph R. Baer, Deceased. Jennie Baer, Appellant. No. 14676, Utah Supreme Court, 562 P. 2d 614.

GROUNDS OF JURISDICTION

a. Nature of Proceeding: This is an appeal from the Supreme Court of the State of Utah where a statute of State of Utah was questioned on the ground of its being repugnant to the Constitution of the United States and the Utah Supreme Court's Decision was in favor of its validity.

b. Date of Judgement and Notice of Appeal: The Utah Supreme Court entered its decision on March 23, 1977. Notice of Appeal from that decision was filed in the Utah Supreme Court on March 30, 1977.

c. Statutory Provision conferring Jurisdiction on Appeal: 28 U. S. C. Section 1257 (2).

d. Cases Sustaining Jurisdiction: Reed v. Reed, 404 U. S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251. Stanton v. Stanton, 421 U. S. 7, 43 L. Ed. 2d 688, 95 S. Ct. 1373. Cohen v. California, 403 U. S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780.

e. Text of Statutes Involved:

Section 74-4-3, Utah Code Annotated, 1953 (Volume 8 at page 49): "Wife's interest in husband's real property. One third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him; provided, that the wife shall not be entitled to any interest under the provisions of this section in any such estate of which the husband has made a conveyance when the wife, at the time of the conveyance, was not and never had been a resident of the territory or state of Utah. Property distributed under the provisions of this section shall be free from all debts of the decedent except those secured by liens for work or

labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. The value of such part of the homestead as may be set aside to the widow shall be deducted from the distributive share provided for her in this section. In cases wherein only the heirs, devisees and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration."

Section 74-4-4, Utah Code Annotated, 1953 (Volume 8, 1975 Pocket Supplement at page 11): "Election of widow to take under will or distributive share. If the husband shall make any provision by will for the widow, such provision shall be deemed to be in lieu of the distributive share secured by section 74-4-3, unless within four months after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, by written instrument filed with the clerk of the court, elect to receive her distributive share, which election shall be construed to be a renunciation of such testamentary provision. In the event that the wife shall be insane or incompetent, or absent from the state, an election shall be made for her by a general guardian, if she has one, or by a special guardian for the purpose appointed by the court."

QUESTIONS PRESENTED

a. Whether Sections 74-4-3 and 74-4-4 Utah Code Annotated, 1953, are invalid as being repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution insofar as they prohibit a husband from granting to his sons in his will an option to purchase all his real property acquired prior to a marriage to a second wife where the Utah Statutes do not impose a similar restriction on a wife.

b. Whether Sections 74-4-3 and 74-4-4, Utah Code Annotated, 1953, are invalid as being repugnant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because they grant a one-third fee simple interest to the surviving wife in real property acquired by the

man prior to marriage, but do not grant a similar right to a husband.

STATEMENT OF THE CASE

Joseph R. Baer died at the age of 89 years. He had eleven children by his first wife and also while married to her acquired a farm. After retirement age his first wife died and he married Jennie Baer, the Appellee. Even though his children were all mature at this time, his six sons continued to work on the farm. In his will he gave his six sons the option to purchase the entire farm for $32,000, and made a liberal provision for his widow guaranteeing her an income for her life.

The six sons exercised the option and the Executors of the estate asked the Court to approve the sale. Upon receiving notice the widow, Jennie Baer (now 89 years of age), objected to the sale on the grounds she needed more time to consider the same. The executors moved to strike the widow's objection.

The lower Court asked the parties to submit written memoranda. In her memorandum the widow made an election to renounce the testamentary provision and take her distributive share. In their memorandum, the Executors stated that if the lower Court did not approve the sale of the entire farm because of the provisions of Section 74-4-3, Utah Code Annotated, 1953, it would deny Joseph Baer of equal protection of the laws under the Fourteenth Amendment of the United States Constitution, because there is no restriction in the Utah Code which would prevent a wife from granting to her sons an option to purchase her real property in her will. In Utah the surviving husband does not have any interest in his wife's real property whether acquired prior to marriage or during the marriage and he has no right of election to take under or against the will.

The lower Court approved the sale under Sections 75-10-3 and 75-10-17 of the Utah Code which would provide that one-third of the gross sales price of the farm be distributed to the widow. The lower Court said in its Memorandum Decision

of June 4, 1976: "To hold otherwise, this court feels, would be in violation of the equal protection provisions of the Utah Constitution and the United States Constitution."

The widow, Jennie Baer, appealed to the Utah Supreme Court. This Court reversed the lower Court. The Utah Supreme Court said Sections 75-10-3 and 75-10-17 did not apply in this case because of the provisions of Section 74-4-3. The Utah Supreme Court noted that "Respondents counter saying . . the statute (Section 74-4-3) violates the equal protection provisions of the state and federal constitutions." The Utah Supreme Court then said "The Utah statute is reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden and successfully survives the equal protection attack."

The Utah Supreme Court ordered the lower court to award the widow her one third share of the decedent's real property (acquired by the decedent before marriage) as it had found Sections 74-4-3 and 74-4-4 of the Utah Code An- to be in compliance with the federal constitution. Under the Utah Supreme Court decision, instead of receiving one-third of the amount of the sale the farm must be divided and one-third of the land given to the widow.

The executors appealed the decision to the United States Supreme Court.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The right to dispose of one's property by will is of such ancient origin that it must be considered one of the basic rights of citizens of this country (79 Am Jr. 2d Wills, p. 273). The right was well known under the old English Common law and has been preserved in this country. The fact that every state has some provision for the probate of wills indicates that the subject is of substantial importance.

In Reed v. Reed, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251, the United States Supreme Court first raised the question of whether a state legislature could make different rules in the

administration of decedents' estates based upon sex. The Court noted that classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause" and found that the state statute that gave preference to male administrators was void. That "reducing the workload of probate courts" and "avoiding intrafamily controversy" were not of sufficient importance to justify the classification based solely upon sex.

Since the right to serve as an administrator must be deemed an important property right (if for no other reason than usually a liberal rate of compensation is allowed based on a per cent of the estate's value), the question immediately arose as to whether a state legislature could give greater property rights to one sex in preference to another or could place a greater restriction on the property right of one sex than on the other.

In Frontiero v. Richardson, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764, the Supreme Court rejected the notion that there is a presumption that wives are financially dependent upon their husbands, while husbands must prove they are financially dependent upon their wives, and instructed the Government to give equal treatment to the sexes with regard to allowances for housing and medical benefits for service-person's spouses.

Based on the opinions in the above cases a widower attacked the State of Florida's tax benefit for a widow and claimed the right to an equal benefit. In Kahn v. Shevin, 416 U.S. 351, 40 L. Ed. 2d 189, 94 S. Ct. 1734 (with three Justices dissenting) the Court noted that in tax matters the States have "large leeway in making classifications and drawing lines which in their judgment produced reasonable systems of taxation" and denied the widower's claim.

The Utah Supreme Court felt this case permits the states to distinguish between sexes in favor of a woman in placing restrictions on property rights.

But in contrast to the decision of the Utah Supreme Court in this case the United States Supreme Court reiterated its

decision in Frontiero v. Richardson (supra.) that there is no presumption that a woman is dependent upon a man for support while a man must prove his dependence upon his wife and allowed widowers to collect equal benefits under the Social Security laws in Califano v. Goldfarb, __ U.S. __, 51 L. Ed 2d 270, 97 S. Ct.____.

If the Federal Government under the Fifth Amendment cannot presume that a woman is dependent upon a man for her support while a man must prove his dependence on his wife to obtain property rights, then how can a state government under the Fourteenth Amendment presume that in all second marriages the man supports the wife so that the state can restrict his property rights, and also presume that no second marriage exists where a man is dependent upon his wife for his support so no restriction on disposition of property is imposed on the second wife. Since the Utah statutes have already rebutted this presumption by imposing the same duty of support on both man and woman (Sections 78-45-3 and 4, Utah Code Annotated, 1953, as amended), it is respectfully submitted that the fact on which the sex-centered generalization in the Utah statutes (Sections 74-4-3, and 4, Utah Code Annotated) is supposed to rest simply does not exist. And following the reasoning in Califano v. Goldfarb (supra.) which discussed the inequity of the forfeiture of the Social Security tax paid by the working wife, we must not forget it was the unpaid first wife who worked to obtain the real property acquired prior to the second marriage which she now forfeits to the heirs of the second wife. See also Weinberger v. Wisenfeld, 420 U.S. 636, 43 L. Ed 2d 514, 95 S. Ct. 1225 and Stanley v. Illinois, 405 U.S. 645, 31 L. Ed 2d 551, 92 S. Ct. 1208.

Up to this point the Supreme Court has applied the doctrine of Reed v. Reed (supra.) to property rights created by the Government. The time is now ripe for a decision on property rights which have been restricted by the Government.

Certainly a decision as to whether a state can limit the power of a man to dispose of real property acquired prior to a marriage while imposing no such restriction upon a wife is of substantial importance to be decided.

In this case it involves the right of six sons to continue to operate the family farm instead of having it divided and destroyed as an operating unit.

In Alabama (Title 34, Sec. 40 et. seq.) Arkansas (Sec. 61-228-229, 61-207, and 61-221), New Jersey (Sec. 3A:35-1 and 2), Rhode Island (Sec. 33-4-1 and 33-6-21), Tennessee (Sec. 31-606-608), and Virginia (64.1-19) the dower right of the wife is a greater right than the curtesy right granted to the husband. The dower right is vested upon marriage and seizin of real property if the wife survives. But the curtesy right depends on whether or not issue is born during the marriage. Where a woman has the right of abortion without consent of the husband it is conceivable that she can effectively deny the man of this valuable property right if she so desires. (See Planned Parenthood of Missouri v. Danforth, __ U.S. ___, 49 L. Ed 2d 788, 96 S. Ct. _____.)

In South Carolina (Sec. 19-101, 19-111), and South Dakota (Sec. 19-153.4) the woman still has greater rights than the man as the right of dower is retained but the right of curtesy has been abolished.

One has only to review the action of the State legislature in Utah to be convinced that future state legislatures also will need guidance in legislating on the subject of dower and curtesy and rights similar thereto.

From 1850 to 1872 the common law rights of dower and curtesy were in effect in the territory of Utah (Hilton v. Thatcher, 31 Utah 360, 88 Pac. 20). In 1872 (Probably because some of the polygamous wives found dower difficult to live with) the common law right of dower was abolished in the territory of Utah (Compiled Laws Utah, 1876, p. 342).

In March 1887 the Congress of the United States restored the common-law right of dower (Compiled Laws of Utah, 1888, p. 119). This remained in effect until January 1, 1898 when the present law was enacted (Sec. 2826 of the Revised Statutes of Utah, 1898 is the predecessor of the present Section 74-4-3, Utah Code Annotated, 1953).

After the Supreme Court decided Reed v. Reed (supra.), the legislature of the State of Utah recognized the unequal treatment of males in matters of probate and enacted the Uniform Probate Code which takes effect on July 1, 1977 (Chapter 150, Utah Session Laws, 1975). At that time males will be in an equal position to women in Utah, but without guidance from the Supreme Court the state could well follow its previous history of changing the laws with respect to property rights in the future.

Until 1976 there was an incentive on the part of state legislatures to give spouses equal treatment because of the marital deduction provisions of the Federal Estate Tax laws which permitted a deduction of one-half of the gross estate inherited by the spouse. When the statutory exemption was $60,000 there was an incentive to save taxes by allowing the spouse to inherit one-half of the estate. But with the exemption now at $120,667 and increasing to $175,625 by 1981 (26 U. S. C. Sec. 2010 (a)), mandatory distributions to spouses may be questioned by future legislatures. This is especially true when one considers the inequities that can result because of the increasing divorce rate (.5 per 1000 in 1890 to 4.8 per 1000 in 1975).

Consider the situation in Utah. H and W are married and acquire real property and have children. In later life they become incompatible and are divorced. The husband takes the real property in the divorce settlement. He marries a second time and he then dies. The second wife, who may have had wealth of her own, now is entitled to one-third of his real property to the detriment of his children by his first wife. With divorces numbering approximately one-half of the marriages in this country (1977 World Almanac, p. 952), and support to dependent children running close to one billion dollars a month, some modification of inheritance laws in favor of children by the first marriage seems likely. It is important for the determination of future rights that the law be clear as to whether a state can place greater restrictions on one sex in the right to dispose of real property by will.

The state legislatures also need to be informed as to

whether they can make different testamentary provisions for men than are made for women because of the present disparity between expected lives of men and women (presently about 8 years, see 1977 World Almanac, p. 955).

If women live longer than men, then it is reasonable to expect that there will be many women, with property, who will enter into second marriages. Should the same rules apply to men and women when it comes to providing for an elective share in lieu of taking under the will? The United States Supreme Court should give a definitive answer, now that legislative discrimination on the basis of sex has been established as a question to be considered.

The reluctance of the Utah Supreme Court to find statutes of the State of Utah in violation of the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution is well documented. (See Stanton v. Stanton, 30 Utah 2d 315, 517 P. 2d 1010, and Stanton v. Stanton, 552 P. 2d 112, Doe v. Planned Parenthood Association of Utah, 29 Utah 2d 356, 510 P. 2d 75; and State v. Judd, 27 Utah 2d 79, 493 P. 2d 604.) And the willingness of the United States Supreme Court to review decisions of the Utah Supreme Court under 28 U. S. C. Section 1257 (2) where the State Court does not find any conflict between the Fourteenth Amendment and the State Statute is likewise well documented. (See Stanton v. Stanton, ___ U.S. ___, 50 L. Ed 2d 723, 97 S. Ct. ___; and Stanton v. Stanton, 421 U.S. 7, 43 L. Ed 2d 688, 95 S. Ct. 1373.)

Here the Utah Supreme Court rejected the argument of the Executors that Section 74-4-3 of the Utah Code is in direct conflict with the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution. In their argument the Executors invited the attention of the Utah Supreme Court to the language in Craig v. Boren, ___ U.S. ___, 50 L. Ed 2d 397, 97 S. Ct. ___, which held "In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender neutral fashion, or to adopt procedures for identi-

fying those instances where the sex-centered generalization actually comported to fact." The Utah Supreme Court chose to ignore the language of this case and even though Section 74-4-3, Utah Code Annotated, is not written in a gender neutral fashion the Court made no attempt to find the facts that would support the sex-centered generalization in second marriages.

The property rights involved in making a testamentary disposition of real estate are of such importance that the matter should be carefully briefed and argued before the United States Supreme Court so that the laws relating to property may be fixed and definite for the purpose of estate planning.

Respectfully submitted,

Theodore S. Perry
Attorney for Appellants

APPENDIX

Decision of Utah Supreme Court

In the Matter of the Estate of
Joseph R. Baer, Deceased

Jennie Baer,
Appellant.

No. 14676
FILED March 23, 1977

HALL, Justice:

This is an appeal from a district court order confirming sale of real property.

Appellant is the widow of the deceased who died testate. The will provided for an option for decedent's six sons by a previous marriage to purchase his real property for a specified sum within six months of his death. The option was timely exercised and they moved the court to confirm the sale. Appellant objected to the sale and asserted the court was without power or authority to deprive her of the statutory right to elect against the will, or to confirm the sale without affording her a fair and reasonable opportunity to make an informed and proper election. The court confirmed the sale over said objections and appellant now maintains that such deprived her of the statutory distributive share of the real property. Respondents counter saying that even if such be the case, the statute violates the equal protection provisions of the state and federal constitutions.

The statutory provision which lies at the very heart of this matter is 74-4-3, Utah Code Annotated 1953, which reads in part as follows:

> One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him.

The foregoing is further supplemented by 74-4-4, Utah Code Annotated, 1953, as follows:

> If the husband shall make any provision by will for the widow, such provision shall be deemed **in lieu of the distributive share** secured by section 74-4-3, unless **within four months** after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, **by written instrument** filed with the clerk of the court, elect to receive her distributive share, which election shall be construed to be a renunciation of such testamentary provision. (Emphasis added.)

It is readily apparent that appellant complied with all of the requirements of the two foregoing sections, however, respondent maintains that the order of the sale is proper under the general provisions of Title 75, Chapter 10, Utah Code Annotated 1953, and particularly section 17 thereof which reads in part as follows:

> When the sale is made and confirmed **after due notice to the widow,** the conveyance also passes the right of the widow to her statutory interest in the property as survivor, . . .
> (Emphasis added.)

The position of the respondents is untenable since it disregards the purpose and objectives of the laws pertaining to such sales, especially as they relate to Sections 74-4-3 and 74-4-4 set forth above.

Section 75-10-17 above does not by its language in any way amend or abridge the widow's rights to her statutory interest, it merely permits a sale, **with her consent,** without the necessity of her executing a deed. Where the widow files an objection to the sale, asserting the court is without power or authority to deprive her of said right of election, the court is disposed to permit the election to be made within the four month period provided by statute, or within such additional time he deems just and equitable.[1]

If this court were to adopt respondent's argument that the filing of the election waived or withdrew the widow's objection to the sale, she would be deprived of her statutory fee simple interest and required to accept one-third of the proceeds of the sale in lieu therof. There is no statutory or case law to support such a result nor to deprive her of the right to elect against the will.

The constitutional issue presented by respondents requires a determination whether the allowance of a distributive share only for widows is a discriminatory classification. Such a classification may be upheld if it bears a fair and legitimate state purpose.

The United States Supreme Court upheld an analogous provision in Florida law which gave widows, but not widowers, a property tax exemption.[2] The Florida Supreme Court upheld the provision saying the statute bore a fair and substantial relation to the object of the statute which was to reduce "the disparity between the economic capabilities of a man and a woman." The United States Supreme Court affirmed, noting statistics showing the disparity in the earning power of men and women, and stated:

> The disparity is likely to be exacerbated to the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

A similar result was reached in **Reed v. Reed,**[3] wherein

the court stated that states cannot:

> . . . . legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."

In Stanton v. Stanton,[4] the court said:

> . . there is . . no question but (a statute) may treat people differently, based on classification, so long as there is a reasonable basis for the classification, which is related to the purpose of the act, and it applies equally and uniformly to all persons within the class.

The Indiana legislature, like Utah, has repealed the widow's share provision and substituted a statutory share for each spouse.[5] Prior to its effective date, a similar case arose[6] and in holding that such did not violate equal protection stated:

> The differing treatment of widows and widowers rests upon some ground of difference which, in our opinion, bears a fair and substantial relation to the object of the legislation, that object being the reduction of the disparity between the economic capabilities of a man and a woman.

The Supreme Court of Colorado[7] reached a similar result in holding that a felony nonsupport statute applicable only to fathers did not violate equal protection since it was based on a a legislative determination that by reason of respective cultural, social and economic differences between the two parents, the father was better able to provide support for his children than the mother.

The Utah statute serves a policy of long standing[8] which cushions the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. It is a legitimate state purpose to support widows who would

have difficulty supporting themselves and therefor does not violate the equal protection clause.

The decisions of this court unanimously support a presumption of constitutionality of legislative enactments. In determining constitutionality, statutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.[9]

Laws must be uniform and classes of persons for or against whom the laws will operate must be established on a rational basis. Such classification must be reasonable and not arbitrary.[10]

This court, in **State v. J.B. and R.E. Walker, Inc.**,[11] stated the following:

> Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others which it leaves untouched.

The Utah statute is reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden and successfully survives the equal protection attack.

The [illegible] of the lower court is vacated and the case remanded [illegible] to award the widow her one-third share of decedent's real property. Costs to appellant.

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[4] In re Thurman's Estate, 13 Utah 2d 156, 369 P.2d 925; In re Bullen's Estate, 47 Utah 96, 151 P. 333 (1915)

[5] Kahn v. Shevin, 416 U.S. 351 (1974) 273 S. 2d 72.

[6] 404 U.S. 71 (1971), citing Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

[7] 421 U.S. 7 (1975).

[8] Utah has adopted Uniform Probate Code effective July 1, 1977.

[6] In re Estate of Parson, 344 N.E. 2d 317 (Ct. App. Ind. 1976); see also Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[7] People v. Elliott, 525 P.2d 457 (Colo. 1974)

[8] History: R.S. 1898 and C.L. 1907; C.L. 1917; R.S. 1933 and C. 1943.

[9] Broadbent v. Gibson, 105 Utah 53, 140 P.2d 939 (1943).

[10] Art. 1, Sec. 2, Utah Constitution.

[11] 100 Utah 523, 116 P. 2d 760 (1941).

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of
JOSEPH R. BAER, Deceased

MARCELL BAER and WESLEY A. BAER,
Executors of the Estate
Appellants

No.

vs.

14676

JENNIE BAER,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that MARCELL BAER and WESLEY A. BAER, Executors of the Estate of Joseph R. Baer, Deceased, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Utah, reversing the Order of the District Court of Cache County, State of Utah, entered in this action on March 23, 1977.

This appeal is taken pursuant to 28 U. S. C. Sec. 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Petition for Probate of Will.
2. Copy of Last Will and Testament of Joseph R. Baer, deceased.

3. Order Fixing Time for Hearing Petition for Probate of Will.
4. Cerificate of Proof of Will.
5. Order Admitting Will to Probate.
6. Inventory and Appraisment.
7. Petition for Order Approving Sale of Real and Personal Property.
8. Order Fixing Time for Hearing Return Sale of Real Estate and Petition for Confirmation thereof.
9. Objection to Sale of Real Estate.
10. Motion to Strike Widow's Objection to Sale of Real Estate.
11. Widow's Reply Memorandum.
12. Executor's Reply Memorandum.
13. Widow's Election to Receive Distributive Share.
14. Memorandum Decision of District Court dated June 4, 1976.
15. Order Confirming Sale of Real Estate and Personal Property.
16. Widow's Notice of Appeal to Utah Supreme Court.
17. Decision of the Supreme Court of the State of Utah dated March 23, 1977.
18. All other matters on file in the Record in the above entitled case now on file in the Supreme Court of the State of Utah.

III. The following questions are presented by this appeal:

A. Whether Sections 74-4-3 and 74-4-4, Utah Code Annotated, 1953, are invalid as being repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution insofar as they prohibit a husband from granting to his sons in his will an option to purchase all his real property acquired prior to marriage to a second wife where the Utah Statutes do not impose a similar restriction on a wife.

B. Whether Sections 74-4-3 and 74-4-4, Utah Code Annotated, 1953 are invalid as being repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because they grant a one-third fee simple

interest to the surviving wife in real property acquired by the man prior to marriage, but do not grant a similar right to a husband.

Theodore S. Perry
Attorney for Marcell Baer and
Wesley A. Baer, Executors of
the Estate of Joseph R. Baer,
Appellants

444 North Main (P.O. Box 364)
Logan, Utah 84321

PROOF OF SERVICE

I, Jan Perry, a stenographer in the office of Ted S. Perry, attorney of record for Marcell Baer and Wesley A. Baer, Executors of the Estate of Joseph R. Baer, deceased, appellants herein, depose and say that on the 28th day of March, 1977, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Jennie Baer, Appellee herein, by delivering the same to the receptionist in the office of Lyle W. Hillyard, counsel of record for said Jennie Baer, located at 175 East First North, Logan, Utah.

/s/ Jan Perry

Subscribed and sworn to before me at Logan, Utah, this 28th day of March, 1977.

/s/ T. S. Perry
Notary Public
Residing at Logan, Utah

My commission expires: July 16, 1977.

Notice of Appeal filed in office of the Clerk of the Supreme Court of the State of Utah on March 30, 1977.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-1634

In the Matter of the Estate of
JOSEPH R. BAER, Deceased

MARCELL BAER and WESLEY A. BAER,
Executors of the Estate,

Appellants

vs.

JENNIE BAER,

Appellee

MOTION TO DISMISS

Appeal from the Supreme Court of Utah

Case No. 14676

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175 East First North
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Appellee

MOTION TO DISMISS

OPINION BELOW

The opinion of the Utah Supreme Court in this matter appears in 562 P.2d 614 (1977). It is set forth in Appellants' Appendix.

FACTS

This case arises from an Order Confirming Sale of Real Estate and Personal Property, in the matter of the Estate of Joseph R. Baer, Probate No. 7909 in the District Court for Cache County, State of Utah, a copy of which is set forth in the Appendix, infra, at page 14, which confirmed the sale of decedent's real estate and personal property for $32,000 as provided in the Will. Clarifications in the Statement of the Case as presented by the Appellants should be noted.

Joseph Baer died at the age of 91. He had twelve children by two wives prior to Appellee, six by the first wife and six by the second. There was no issue of the marriage between Appellee and Joseph Baer. There were, however, six unmarried children home at the time Appellee and decedent were married whom Appellee helped raise after their marriage. Of decedent's six sons, only two remained at home to work on the farm; the others left the area.

Appellee and Joseph Baer were married 33 years, which was longer than the combined marriage time to his prior two wives and during which time Appellee also helped with the farming operation. Further, although the land in question has been appraised as low as $60,000 by Appellants, appraisals commissioned by the widow indicate the property is worth $220,000.

In his Will, Baer gave his six sons the option of purchasing the entire farm and equipment for $32,000 and made a meager provision of $70.00 per month with the right to live in the family home for life for his widow. On May 6, 1976, the widow elected against the Will.

All six sons exercised the option provided in the Will in a timely fashion and moved the District Court to confirm the sale of the property. After an objection to confirmation of the sale was made by Appellee, the court in a Memorandum Decision set forth in Appellee's Appendix, confirmed the sale on June 4, 1976, pursuant to § 75-10-3 and § 75-10-17 Utah Code Annotated, 1953. [hereinafter cited as U.C.A.]

The District Court held that the widow was entitled to a one-third interest in the property as provided under § 74-4-3 and 74-4-4, but that the value of the property was set in the Will as $32,000. The widow, Jennie Baer, appealed to the Supreme Court of Utah. Appellant did

not cross appeal and apparently accepted the District Court's holding that the widow is entitled to a one-third interest. The sole issue was whether the value of the surviving widow's one-third was set by the Will or § 74-4-3 and 74-4-4.

The Utah Supreme Court reversed the lower Court, allowing the widow a one-third interest in the value of the real property. In its decision, the Court stated that the widow complied with all necessary requirements of applicable statutes and that the executors position is "untenable", not on constitutional grounds, but on the grounds that their reading of the statute "disregards the purpose and objectives of the laws pertaining to such sales, especially as they relate to § 74-4-3 and 74-4-4."

The Utah Court ordered the lower Court to award the widow her one-third share of decedent's real property, some of which was inherited and some of which was acquired during his first marriage.

The executors now appeal the decision to the United States Supreme Court pursuant to 28 U.S.C. § 1257(2). On May 23, 1977, Appellant's filed the Jurisdictional Statement.

POINT I

THE APPEAL FROM THE UTAH SUPREME COURT DECISION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends that Sections 74-4-3 and 74-4-4, Utah Code Annotated, 1953 are invalid as being repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The law is clearly to the opposite effect, rendering the question of this appeal insubstantial.

This Court's explanation of insubstantial federal ques-

tions in *Ex parte Poresky,* 290 U.S. 30, 31-32, 54, S. Ct. 3,4-5, L.Ed, 152 (1933) is dispositive of this case in holding that a question may be insubstantial either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subjct of controversy. *Levering and Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105, 53 S. Ct. 549, 550, 77 L.Ed. 1062 (1933); *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288, 30 S. Ct. 326, 54, L.Ed. 482; *McGilvra* v. *Ross,* 215 U.S. 70, 80, 30 S. Ct. 27, 54 L.Ed. 95 . . ." It is clear that decisions of this Court foreclose any controversy regarding equal protection, based on the facts of this case. The following analysis has its inception in *Reed* v. *Reed,* 404 U.S. 71, 30 L.Ed. 2d, 225, 92 S. Ct. 251 (1971), the first recent decision concerning gender-based discrimination.

In *Reed, supra,* the Court invalidated a probate statute which denied a female the opportunity to become the administrator of an estate of a decedent if a male were equally entitled to administer. In applying the Equal Protection Clause of the Fourteenth Amendment, the Court reiterated the test for determining a constitutionally permissible discrimination:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference and having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L.Ed 989 (1920)." *Reed, supra,* at 254.

The decision further recognizes that there are permissible classifications which the states are not prohibited from making.

> In applying that clause [the Equal Protection Clause], this Court has consistently recognized that the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways. *Reed, supra,* at 253, and cases cited therein.

The following term, this Court decided *Frontiero v. Richardson,* 411 U.S. 677 in which it held invalid an act of Congress, providing that a male serviceman could claim his wife as a dependent upon no evidence of dependency, whereas a female member of the armed services had to prove the dependency of the husband before she could claim his dependency. Again the Equal Protection Clause was relied upon to hold the discrimination unconstitutional.

Later, however, a Florida statute which allowed widows a $500 exemption from property taxes was held constitutional by this Court through its invoking the *Reed* "substantial relation" test. *Kahn* v. *Shevin,* 416 U.S. 351, 40 L.Ed. 2d 189, 94 S. Ct. 1734 (1974), wherein the Court reasoned that the plight of the elderly widows is clearly more critical than that of widowers.

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs . . . the disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced in to a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

> There can be no doubt, therefore, that Florida's differing treatment of widows and widowers "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed* v. *Reed, supra,* quoting *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560. *Kahn, supra,* at 192-3.

(See also footnote 2, Mr. Justice Rehnquist's dissent in *Califano* v. *Goldfarb*, No. 75-699 (1977) wherein it is stated that in 1974, "two out of three poor persons over 65 were women. Four out of five men over 65 were married, but 52% of aged women were widows. Of older women living alone, 33% were below the poverty line.")

More recently, the equal protection issue of a gender-based discrimination in a Social Security statute which allowed old age benefits obtained by women aged 62 years before 1975 greater than those obtained by men of the same age, was disposed of succinctly in a per curiam opinion. In a lucid analysis of a statute which redresses "our society's longstanding disparate treatment of women," the Court recognized these older women as a group "who as such have been unfairly hindered from earning as much as men." *Califano* v. *Webster,* .... U.S. ...., 51 L.Ed 2nd 360, 97 S. Ct. ..... 1977. In that case the Court upheld the constitutionality of such statute, the purpose of which is analogous to the objective of Sec. 74-4-3 and 74-4-4 — to extend benefits to widows, a traditionally disabled class, in a non-discriminatory mode. Furthermore, in Utah, married women, having been the object of historical discrimination in polygamy, are even guaranteed these property rights in the Constitution of Utah, Article XXII, Sec. 2.

Following the *Reed, Kahn, Webster* rationale, it is clear that unlike the *Frontiero, supra,* fact pattern, this case presents a statute which as the Utah Supreme

Court correctly stated, is "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Kahn, supra,* at 193. The statutes in question here do not flatly deny benefits to or cause undue burden on the other sex as did those in *Reed, Frontiero,* and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975). They do, however, provide for a classification which this Court has already deemed "reasonable" and which rests on a disparity having a "fair and substantial relation to the object of the legislation." The question presents no controversy based on previous decisions of this Court.

Secondly, there is no substantial question involved because the argument of Appellants is "without merit." The Appellants claim a substantial federal question because of a claimed basic right to will property without citing any judicial authority for the establishment of such right. On the other hand, this Court has recognized dower as a right which "while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits." *Ferry v. Spokane, Portland, and Seattle Railway Company,* 258 U.S. 314, 66 L.Ed. 635, 42 S. Ct. 358 (1922). It therefore rests with the legislature to determine property rights of each spouse. *Ferry, supra,* 20 ALR 1326, 1329. Acquiring this property is a contractual obligation on the parties by implication and cannot be avoided.

The statutes questioned by Appellants create a contractual obligation between the parties in marriage, giving the wife a contractual right in the property that the husband owned at any time during the marriage. This right has been recognized in Utah since statehood and can easily be avoided by a husband by a pre-nuptial

agreement or by placing the property in trust. Instead, he was allowed to enter into a marriage relationship with Appellee when both parties knew or should have known that by such marriage, Appellee would acquire a one-third interest in the real estate he owned. She had the right to rely in contract on that right being given her and, though there would be no question presented here today, if it was not an important consideration of marriage, decedent could have easily removed the property from his estate prior to marriage by contract or by trust.

After they lived together for 33 years in the marriage relationship (to approximately age 90 for both), that he wishes now to give her nothing in return and deprive her of what little right she expected to enjoy is unthinkable. What Appellants seek to do is to have this Court change the effective date of the legislation embodied in the Uniform Probate Code and thereby create ex post facto laws to the detriment of people who have relied on the same. Therefore, the decision made by this Court will not affect Utah law except for those deaths occurring prior to July 1, 1977, and in which such an issue is raised. Although this case is of significant interest to the parties involved, it can scarcely be imagined how it can be of such national import as to require a consideration by this Court.

Furthermore, as Appellants themselves stated in their brief to the Utah Supreme Court, Utah is the only state which, presently, does not provide property rights in both spouses. However, as of July 1, 1977, the Utah Uniform Probate Code will be effective, granting both spouses a one-third statutory interest in a portion of the deceased spouse's property, known as the augmented estate. This law has been passed by the legislature of Utah prior to Mr. Baer's death, but the

effective date was purposely postponed until July 1, 1977, to allow the residents of the state to prepare for the changes. After Idaho became the first state to adopt the Uniform Probate Code, ten other states adopted a similar code, South Dakota being the only one to afterwards repeal: Alaska-Alaska Stat. § 13 (1972), Arizona-Arizona Rev. Stat. Ann. § 14 (Spec. Pamphlet 1974), Colorado-Colo. Rev. Stat. Ann. § 15-10 to - 17 (1973), Minnesota-Minn. Stat. Ann. § 524 (1975), Montana-Mont. Rev. Codes Ann. § 91A (Spec. Uniform Probate Code Pamphlet 1974), Nebraska-Neb. Rev. Stat. § 30-2201 - 2902 (Cum. Supp. 1974), New Mexico-N.M. Stat. Ann. § 32A (Spec. Probate Code Pamphlet 1976), North Dakota-N.D. Cent. Code § 30.1 (Spec. Uniform Probate Code Supp. 1975), and Utah-Utah Code Ann. § 75 (Spec. Uniform Probate Code Pamphlet 1975).

Thirdly, the issues as presented by Appellants for the Supreme Court's attention are in fact not present. The District Court Decision, as shown by Appellee's Appendix, allowed the surviving widow a one-third interest in the property, but set the value of such at the amount specified in the Will and *not* a one-third interest in the actual property involved. Appellants did not cross appeal on that issue pursuant to 74(b) U.R.C.P. and, as stated in the Utah Supreme Court's Statement of Fact, instead of receiving one-third of the amount of the sale, the farm must be divided and one-third of the land given to the widow. The question presented to and decided by the Utah Supreme Court was whether § 75-10-3 and 75-10-17 modify the provisions of § 74-4-4 and 74-4-3. The Court held they had not. Appellants, by choosing not to appeal the decision of the District Court did not properly present to the Utah Supreme Court the constitutional question which they now wish to present to the United States Supreme Court.

Therefore, considering the rapid trend toward equalizing property rights, the facts that no other states would be affected by a ruling on this matter on appeal, that this question becomes moot for all others similarly situated in Utah after July 1, 1977, and that the question was not properly brought before the Supreme Court, the appeal should be dismissed as presenting no substantial federal question.

POINT II

THE JUDGMENT OF THE STATE COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Utah Supreme Court did not rely on the constitutional provisions of the Fourteenth Amendment in holding that Appellee is entitled to make the election against the decedent's will as provided by § 74-4-3, U.C.A. 1953. Rather, it ruled that the statutes § 74-4-3 and 74-4-4, when harmonized with 75-10-3 and 75-10-17, allowed the widow her statutory share of decedent's property of which he died seised as a matter of state law. The Utah Supreme Court only secondarily disposed of the constititonal issue brought on appeal, having first decided the controversy on the basis of state law. The decision reads, in pertinent part:

> If this Court were to adopt respondents' argument that the filing of the election waived or withdrew the widow's objection to the sale, she would be deprived of her statutory fee simple interest and required to accept one-third of the proceeds of the sale in lieu thereof. There is no statutory or case law to support such a result nor to deprive her of the right to elect against the will.

It is well settled law that a judgment must have rested on the basis of a federal question. Nor is it enough that

a federal question sought to be raised as the basis of a case is passed upon, but the case is apparently decided upon the basis of a state statute. This is not a federal question. *DeSaussure v. Gaillard,* 127 U.S. 216, 32 L. Ed. 125, 8 S. Ct. 1053 (1888). Further, this Court will not even review a decision if it may have been rendered upon a ground not involving a federal question, *McGoldrick* v. *Gulf Oil Corp.,* 309 U.S. 2, 60 S. Ct. 375 (1940).

The decision clearly rests on a non-federal basis, specifically, that the widow (the Appellee in this action) complied with all appropriate requirements of § 74-4-3 and 74-4-4 and that 75-10-17 in particular, does not modify the former. Since the decision rested on an adequate non-federal basis, Appellant's appeal should be dismissed as provided in Rule 16(b), Supreme Court Rules.

POINT III

A DETERMINATION OF THIS APPEAL ON ANY BASIS EXCEPT DISMISSAL WOULD VIOLATE THE LONGSTANDING POLICY OF THIS COURT'S REFUSAL TO CONSIDER HYPOTHETICAL OR CONTINGENT QUESTIONS.

Appellants argue strenuously that it is important to determine the future rights of persons in disposing of their real property by will and that state legislatures must be informed of equal protection requirements. Such concern is admirable but does not constitute the basis on which this Court decides to hear controversies. Appellants may not maintain an action "for a mere declaration in the air." *Giles* v. *Harris,* 189 U.C. 475, 486, 23 S. Ct. 639, 47 L. Ed. 909 (1902).

Here, Appellants are not widowers seeking relief on an equal basis with Appellee; they are merely directing

this Court's attention to a question contingent upon a decision of state law.

In *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688, 711 (1936) the decision states:

> 2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . .
>
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case can be disposed of. . .

Clearly, this Court would be anticipating a constitutional question since Appellants would not be gaining any property rights affecting them. Their question simply states a hypothetical situation not reflective of the facts. The proper party to question the statutes would be that of a surviving husband who should claim a one third right in decedent wife's estate of real property.

Secondly, it is the policy of this Court to compensate the victims of discrimination rather than withhold a right from those persons benefiting from the discrimination where a statute is defective because of underinclusion as contended by Appellants. Even if the Court were to compensate males by extending the statutes in question, these Appellants would not gain any rights or relief. The question they present is totally hypothetical given the facts.

It is a longstanding rule that in equal protection questions this court will extend coverage to the aggrieved. Mr. Justice Harlan noted in a concurring opinion in *Welsh v. United States,* 398 U.S. 333, 361 (1961), a court may "extend the coverage of the statute to include those who are aggrieved by exclusion." Examples of such

extension include the Court's extending jury service from only "electors" to enfranchised blacks in 1880. *Neal v. Delaware,* 103 U.S. 370. In *Sweat v. Painter,* 339 U.S. 637 (1950), the Court expanded laws regarding access to state institutions of higher learning so that black students have equal access. And in *Levy v. Louisiana,* 391 U.S. 68 (1968), the Court expanded the rights of illegitimate children by allowing them to recover wrongful death benefits equal to legitimate children.

The Utah legislature has already deemed it appropriate to extend these property rights to males as evidenced by the ratification of the Utah Uniform Probate Code. Had the legislature thought it necessary to make this effect retroactive, it should have done so. Rather, considering the grave implications on marriage, probate, and property law, it prudently postponed the effective date to a future day which is now less than a month away, to allow persons affected notice of change.

Considering the tangential relation this constitutional question bears to Appellants and the impending amelioration of disparity, the Court should dismiss the case on the ground that the issue raised is merely declaratory and hypothetical to Appellants.

CONCLUSION

The appeal should be dismissed for three reasons: First, there is no substantial federal question. Secondly, the judgment of the Court below rests on an adequate non-federal basis. The Utah Supreme Court clearly decided the controversy prior to a determination of a federal issue. Thirdly, only a dismissal is appropriate where a question is hypothetical or contingent.

For the above reasons, this Court may dismiss an appeal brought under 28 U.S.C. Section 1257(2).

Respectfully submitted,

APPENDIX

IN THE DISTRICT COURT FOR CACHE COUNTY, UTAH

In the Matter of the Estate of JOSEPH R. BAER, Deceased	PROBATE NO. 7909 MEMORANDUM DECISION

The widow of the above named deceased has filed an objection to the sale of property on the grounds that she need not take under the will, but to receive by election one third in value of the legal or equitable estates in real property pursuant to Section 74-4-3 UCA and 74-4-4 UCA and that therefore the sale of realty should not be approved.

The court holds that the sale may be approved. Further that the direction of sale must be observed as provided by Section 75-10-3 and that pursuant to Section 75-10-17 UCA the widow need not consent to such sale but only reecive notice of the same. To hold otherwise, this court feels, would be in violation of the equal protection provisions of the Utah Constitution and the United States Constitution. Objections to the said sale are hereby denied and counsel for executors is hereby requested to prepare an order in conformance with this Memorandum Decision.

DATED June 4, 1976.

VeNoy Christofferson, District Judge